IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. WILLIAM ROBERT HETZEL, Appellant.	No. 38221-1-II UNPUBLISHED OPINION

Hunt, J.—William Robert Hetzel appeals his third degree assault jury conviction. He contends that (1) the evidence was insufficient to prove that he used a weapon or thing to commit the crime; (2) the trial court erred when it did not instruct the jury that a bare fist and the ground do not constitute a weapon instrument or thing; and (3) trial counsel failed to provide effective representation because he did not propose such an instruction and made other erroneous decisions. We affirm.

FACTS

William Robert Hetzel attacked his sister Ann,[1] threw her to the ground, choked her, and beat her. Ann described the attack as follows:

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[1] Because Ann's last name is also Hetzel, we use her first name for clarity; we intend no disrespect.

> He turned around and swung. He was pointing towards the car and then turned around and swung at me. I did not seen [sic] it coming. I hit the ground, and that's when he grabbed me and started punching me in the back of the head and wrapped his arm around my throat and started strangling me.

I Report of Proceedings (I RP) at 36-37. Ann also suffered a black eye when Hetzel punched her and numerous cuts and bruises as her face bounced against the pavement.

The State charged Hetzel with second degree assault and, in the alternative, the lesser included crime, third degree assault. The jury convicted him of the lesser offense.

ANALYSIS

I. "Instrument or Thing Likely To Produce Bodily Harm"

The third degree assault charge was based on RCW 9A.36.031(d), which requires that the offender "with criminal negligence, cause bodily harm to another by means of a weapon or other instrument or thing likely to produce bodily harm." Hetzel does not challenge his sister's description of the attack. He argues only that neither his hands nor the pavement can be considered "things, weapons, or instruments" within the context of RCW 9A.36.031(d).

We rejected this argument in *State v. Marohl*, 151 Wn. App. 469, 475, 213 P.3d 49 (2009), in which we held that when the defendant slammed the victim into a barroom floor, he used an "instrument or thing" (the floor) to cause the injuries. Here, as in *Marohl,* the evidence showed that the injuries to Ann's face were the result of her impacts with the pavement.

As we also held in *Marohl*, in the absence of some indication of confusion, the trial court had no duty, sua sponte, to instruct the jury that bare hands, alone, do not constitute a weapon or thing. *Marohl*, 151 Wn. App. at 477. Nothing in the record here suggests the jury was confused about the elements of the crime. Furthermore, neither party argued to the jury that hands could

be a weapon or thing for purposes of the assault charge; rather, both focused on the pavement.

II. Effective Assistance of Counsel

Hetzel also contends that he did not receive adequate representation at trial because counsel (1) failed to request an instruction relating to bare hands, (2) failed to object when the court did not offer such an instruction sua sponte, (3) failed to present professional medical testimony about Ann's injuries, and (4) advised him not to testify.[2] This argument also fails.

To prevail on a claim of ineffective assistance, Hetzel must show both (1) that defense counsel's performance was deficient, and (2) that counsel's deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 693, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). If defense counsel's conduct can be characterized as trial strategy or tactics, it does not constitute deficient performance. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996).

Hetzel's argument about the lack of a jury instruction – that bare hands are not weapons -- fails for the reasons we discuss above. No additional instruction was necessary, and counsel did not err in failing to ask for one. *See Marohl*, 151 Wn. App. at 478.

As to defense counsel's advice not to testify, the trial court made it clear that the State could present evidence of Hetzel's eight prior convictions if he took the stand. When the exclusion of testimony also excludes the possibility of damaging rebuttal testimony, Washington courts will find counsel neither deficient nor the cause of prejudice to the defendant. *See In re Personal Restraint of Hutchinson*, 147 Wn.2d 197, 207-08, 53 P.3d 17 (2002). Hetzel does not indicate what favorable evidence he would have provided if he had testified; thus, he has not

[2] He makes the second and third claims in his statement of additional grounds (SAG).

shown that counsel's advice was deficient or prejudicial.

For similar reasons, we reject Hertzel's argument about counsel's "failure" to call a medical expert as a witness fails. Hertzel's sister suffered no broken bones or internal injuries, and the State produced photographs of the cuts and bruises on her face. Thus, it is not clear what expert testimony could have added. Furthermore, it appears that such expert medical testimony would have focused the jury's attention on Ann's injuries, rather than on defense counsel's arguments about dysfunctional relationships and witness credibility. Such reasonable tactical decision does not support a claim of ineffective assistance of counsel.

Affirmed.[3]

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Hunt, J.

We concur:

Armstrong, P.J.

Penoyar, J.

[3] In its brief, the State has requested costs on appeal. It must follow the procedures in RAP 14.4 to obtain them.